The court went on to conclude:

> "We think a sensible interpretation of the verification requirements of Rule 23(b), in the light of the realities of litigation of this nature, must relieve the plaintiff after two and one half months from the necessity of recalling technical factual information which she received from trusted advisors and upon which she acted pursuant to their advice." (R. 234-235).

Again the court stated:

> [W]e conceive that all but the most sophisticated investors must rely upon attorneys, or other advisors to supply a substantial part of the information upon which any such complaint rests. We think the rule would be satisfied by verification of intricate factual and conclusory allegations in reliance upon such advice and information." (R. 236).

On the other hand the court concluded that to give any effect to the verification requirement, the verifier must have some minimum information and understanding. The court stated in its interpretation of that minimum as follows:

> "But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint." (R. 236).

The court held:

> "Rule 23(b) is one of the few instances in which the federal rules require verification of pleadings. We think that that provision requires something more

than the mere formality of reckless swearing to the truth of the matters not known. The derivative suit is a unique vehicle of litigation. The holder of one share of stock who is disgruntled at some act of a corporation can, by this device, embroil the corporation and its officers and directors in protracted litigation. We think the verification requirement is designed to compel a plaintiff to begin such a suit with sufficient knowledge of fact and information to show by his verification that there is substantial basis to support the complaint which he makes." (R. 235-236).

The court concluded that there could be no question that the requirements of Rule 23(b) were not satisfied in this case. The plaintiff testified affirmatively to only four matters:

"That she was an owner of Hilton Hotels' stock, that the stock missed a dividend, that she thought her stock was not right and that she consulted Mr. Brilliant relative to the meaning of the written offer submitted to her for the purchase of a number of Hilton Hotel shares." (R. 234).

The court stated:

"In the same light, no one can successfully refute plaintiff's positive statement that she did not know who the individual defendants were, that she did not know of any wrongful acts which they had done, that she did not know of any facts upon which she had alleged that the individual defendants had caused the purchase offers to be made, that she knew nothing about any protest which she had made to the corporation, except for the fact that she had signed a letter shown to her, and that she did not understand the factual basis of her complaint." (R. 234).

The court further stated:

"[W]e find it inconceivable that the instigator of a suit of this nature could fail to know the identity of the individual defendants as directors and officers of the corporation and to know in a general sense what wrongful acts she conceived to have been done which formed the whole supporting skeleton for the suit which she has filed. We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.

"We can only conclude, as did the court below, that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant.

* * *

"[I]t affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about. We must conclude that there was, in fact, no verification of this complaint.

"That conclusion cannot be altered by the fact that many of the material allegations of the complaint are obviously true and cannot be refuted. Nor can it be altered by the fact that plaintiff is a person having little education and, quite apparently, wholly lacking in sophistication and financial matters. Those limitations can't apologize for her affirmative statements, for example, that she knew of no fact upon which she

alleged that the individual defendants had caused the stock purchase offers to be made, and that she did not know why she had alleged that those defendants had committed any of the unlawful acts alleged. These things she must have known to give legitimacy to the serious charges made against those individuals.

* * *

"We conclude that any lesser requirement would make the verification provision farcical." (R. 235-239).

SUMMARY OF THE ARGUMENT.

It is respectfully suggested that this Court, the ultimate voice in American jurisprudence, will not lend that voice to approve the filing of a false affidavit by ignoring what petitioner did herein. Rather the voice of this Court should speak out to decry the misuse of the oath, to establish a most meticulous standard of conduct for all who seek protection of the Federal Courts.

The verification of the complaint by petitioner was false. She knew nothing of her law suit, she did not understand even the barest outline of what she charged, yet she swore that she either knew those charges were true, or that she was informed of them and she believed them to be true. Such false swearing, without more, would justify the dismissal of any action.

In the instant case, however, petitioner's cause of action was derivative. She sued not in her own behalf, but in behalf of all shareholders of Hilton Hotels Corporation. In so purporting to act for all, she was required by Rule 23(b) to provide assurances as to her suit that are not required of other plaintiffs. These assurances include the verification of the complaint, which means just what it says—the verification of the complaint. Neither Rule 23(b) nor its application to this case is arbitrary or discriminatory.

There are good reasons for the requirements of Rule 23(b). A plaintiff, before taking control from the elected directors and, on behalf of all shareholders, putting the corporation to the expense and dislocation of a long lawsuit, must swear by himself or by a responsible fiduciary of the plaintiff that the allegations of the complaint are true, or are believed to be true. Of course the plaintiff may rely upon the advice of trusted counselors. A fiduciary may sue on behalf of a shareholder so lacking in understanding as to be unable to comprehend the nature of the action. But, in any case, a truthful verification must be provided.

This was not done in the instant case. Here the instigator of this litigation refused to verify the complaint. He caused it to be filed in the name of the petitioner, a puppet plaintiff, and procured the false verification of the complaint by that plaintiff. This is a serious matter. The issue cannot be avoided by irrelevant and specious arguments concerning the differences between "knowledge" and "belief", nor by reliance upon the signature of counsel under Rule 11. The filing of false affidavits in the Federal Courts is a practice which deserves the severest condemnation.

Petitioner's counsel concede that this is a derivative action and that some kind of verification was required by the Rule. They argue, however, that the Rule's requirement that "the complaint shall be verified by oath" should be "interpreted" to mean that verification of a few allegations, concerning standing to sue, will suffice.

This "interpretation" is flatly contrary to the unambiguous language of the Rule as it has existed since 1882. It is not supported by the history of the Rule or by the cases which have interpreted it. The argument is based upon an assumption that the only purpose of Rule 23(b) is the prevention of collusive suits between corporate management and "friendly" shareholders.

The language of the Rule and the decisions of this Court and lower Federal Courts demonstrate that the Rule has a number of other purposes; including the prevention of speculation in litigation and the assurance, by a responsible statement under oath, that there is good cause for the charges made in the complaint and a real necessity that the cause of action be prosecuted by a shareholder rather than by the corporation itself. No assurance of any kind is given by a false and groundless verification.

The record in this case demonstrates that the trial judge repeatedly suggested that the defects revealed by plaintiff's deposition be corrected by adding additional party plaintiffs or by substituting a proper verification. Petitioner and her counsel insisted upon standing on petitioner's false verification, thereby confronting the trial judge with the choice of dismissing the action or approving the nullification of the Federal Rules. Dismissal under these circumstances was wholly appropriate.

ARGUMENT.

I.

PETITIONER'S VERIFICATION WAS A DELIBERATELY FALSE PLEADING AND A FRAUD UPON THE FEDERAL COURTS. AS SUCH, IT REQUIRES THE DISMISSAL OF THIS ACTION.

Petitioner's argument never faces up to the fact of the false character of her affidavit of verification and the consequences of that falsehood. The verification was not merely false in some technical or theoretical aspect. It was wholly and completely false. It was false because petitioner swore that she was familiar with the allegations of the complaint when in fact she was totally unfamiliar with the allegations and with the subject matter of the complaint.

It was false because she swore that certain allegations were true as of her own knowledge when she had no knowledge concerning those allegations and did not even understand them. The verification was false because petitioner swore that she made every other allegation on information and belief when in fact she had no information upon which to base a belief as to the truth of any allegation. She did not understand any of the allegations nor did she have any idea what the law suit was all about. She is a puppet. Nothing more.

The deliberate filing of the false affidavit is a fraud upon the Court, even if it could be assumed that the affidavit was unnecessary or that the scope of the affidavit was unnecessarily broad. This Court upheld a perjury conviction even though the perjury had occurred in a trial based upon an indictment which was later determined to be defective. *United States* v. *Williams*, 341 U.S. 58 (1951). The Court stated at page 68:

> "Here, however, we have a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury. We have a court empowered to take cognizance of the crime of perjury and decide the issues under that statute. The effect of the alleged false testimony could not result in a miscarriage of justice in this case but the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony. That statute has led federal courts to uphold charges of perjury despite arguments that the federal court at the trial affected by the perjury could not enter a valid judgment due to lack of diversity jurisdiction, or due to the unconstitutionality of the statute out of which the perjury proceedings arose."

Accord: *Kay* v. *United States*, 303 U.S. 1, 6-7 (1938).

In other cases this Court has referred to perjury as a "pollution" of the judicial process. *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956). Cf. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124 (1956).

Petitioner's counsel seek to avoid the inevitable conclusion of falsehood on three grounds. First, they contend that none of the allegations of the *complaint* have been shown to be false and that many are correct. Secondly, they rely upon extensive investigations allegedly made by Mr. Brilliant, and by petitioner's counsel, prior to filing the complaint. Third, they argue that the verification was not false because petitioner relied upon general assurances by Mr. Brilliant and her counsel that the allegations were well-grounded. These arguments seriously misapprehend the ground upon which the complaint was dismissed and the second ground confuses the requirement of Rule 23(b) with the requirement of Rule 11.

A. Petitioner's Affidavit Was False Because She Was Completely Ignorant of the Truth or Falsity of the Allegations of the Complaint.

Plaintiff's argument concerning the truth of the allegations of the *complaint* ignores the fact that it is plaintiff's *verification* and not the *complaint* which is alleged to have been false. Petitioner's deposition establishes conclusively that her *affidavit* of verification was false regardless of the truth or falsity of particular facts alleged in the *complaint* itself.

For a very long time the law has recognized that it is false to swear or represent that a person knows or believes something to be true when in fact he has no knowledge or belief on the subject.

The decision in *In Re Frank*, 234 Fed. 665 (E.D. Pa. 1916) *affm'd* 239 Fed. 709 (3d Cir. 1917) involved a situation very similar to the one in the case at bar. The court described the situation as follows, at 234 Fed. 666:

> "At the trial upon the issue of the bankruptcy of Charles Frank, the three subscribers to the creditor's petition were called, and from their sworn testimony it appeared that, at the time they respectively signed the petition, they had no knowledge of any of the acts of bankruptcy alleged therein, and that they did not make oath to the petition before the notary public who attached his jurat thereto. Upon this state of facts, the petition was dismissed because it did not meet the requirements of Section 18(c) of the Bankruptcy Act providing that: 'All pleadings setting up matters of fact shall be verified under oath.' "

The creditors then attempted to amend their petition with a proper verification and to present depositions showing knowledge of the alleged acts of bankruptcy. The Court refused to allow the amendment, stating at page 666:

> "Insofar as the facts now sworn to are contradictory to those deliberately, freely and voluntarily testified to under oath by the deponents in court, their depositions cannot be considered. . . ."

In the law of deceit one may make an intentional false representation either if he knows the representation is false or if he makes the representation recklessly in ignorance of its truth or falsity.

> "[T]he jury were properly instructed, that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule." *Cooper* v. *Schlesinger*, 111 U.S. 148, 155 (1884).

> "Statements not known to be true by the person making them are in law false." *United States* v. *Bradford*, 148 Fed. 413, 424 (E.D. La. 1905), *aff'd* 152 Fed. 616 (5th Cir. 1907).

Yates v. *Boteler*, 163 F.2d 953, 959 (9th Cir. 1947); *Third Nat. Bank* v. *Schatten*, 81 F.2d 538, 540 (6th Cir. 1936); *Union Pac. Ry. Co.* v. *Barnes*, 64 Fed. 80, 83 (8th Cir. 1894); *Tone* v. *Halsey, Stuart & Co., Inc.*, 286 Ill. App. 169, 180, 3 N.E. 2d 142 (First Dist. 1936); *Brennan* v. *Persselli*, 353 Ill. 630, 635, 187 N.E. 820 (1933).

B. Investigations by Petitioner's Counsel May Have Satisfied Rule 11, But Such Investigations Have No Bearing on the Truth of Petitioner's Verification.

Throughout petitioner's brief it is constantly suggested that the investigations allegedly made by Messrs. Brilliant and Rockler should somehow preclude the dismissal of the complaint. Insofar as the investigations themselves are relied upon, this argument reflects a confusion between the requirements of Rule 11 and Rule 23(b).

The affidavits of Rockler and Brilliant concerning their investigations might well be relevant to a motion to dismiss the complaint as sham under Rule 11, or a motion to challenge the propriety of the attorneys' signature to the complaint under that Rule. But the Federal Rules require that complaints in derivative suits be verified and *also* be signed by counsel. The argument justifying counsel's signature under Rule 11 wholly fails to consider the verification requirement of Rule 23(b).

As the Court of Appeals stated:

> "Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a mere semantic

exercise in the drafting of its provisions. Had they intended the certification provision of Rule 11 to supersede the verification provision of Rule 23(b), we think that the latter provision would have been omitted. We think the intent was to impose a condition of added assurance in the narrow field to which 23(b) applies." (R. 236).

C. Petitioner's Blind Faith in Brilliant's General Assurances Do Not Constitute a Basis for Allegations on Information and Belief.

Apart from the arguments based on Rule 11, petitioner's counsel argue that Mrs. Surowitz' verification was proper because she relied upon general assurances of Mr. Brilliant that he and Rockler had investigated the allegations of the complaint (none of which she understood) and considered them to be well grounded. This argument is untenable.

It flies in the face of the very language of the verification form chosen by petitioner's counsel—a form of verification substantially identical to that commonly used in both Federal and State courts. The verification states that the plaintiff is familiar with the allegations of the complaint, that she knows some of them to be true and correct, and that she makes each of the others on information and belief and believes them to be true.

It is impossible to stretch the English language so far as to say that such a verification accurately or reasonably describes a factual situation in which the plaintiff is totally unfamiliar with the subject matter or accusatory allegations of the complaint and in which she has no knowledge or information sufficient to form a belief as to any of the accusatory allegations but makes them in blind faith upon the general assurances of another person.

Failure to disclose this factual situation is contrary to the purpose of the verification requirement of Rule 23(b) and is a fraud upon the court.

All of the authorities cited on pages 35-36 of petitioner's brief stand for the concededly sound proposition that firsthand *knowledge* differs from "information and belief," and that a complaint may be verified in part on the basis of information and belief. But these cases are irrelevant here. No one denies the right of Mrs. Surowitz to verify properly on information and belief. In fact, the Court of Appeals expressly stated that, in shareholder derivative actions, most plaintiffs would naturally rely upon information received from their advisors or attorneys.

It is elementary that the difference between allegations upon knowledge and allegations upon information and belief is the difference between first-hand knowledge and a conviction based upon some kind of hearsay. In each of the cases cited in petitioner's brief, it had been contended that a verification was improper because the verifier could not testify to the facts alleged on the basis of his own first-hand knowledge. For example, he might have alleged, on information and belief, that a stock transaction took place or that corporate directors were engaged in certain secret and improper dealings. The basis of these allegations might be newspaper accounts, reports filed by the corporation or hearsay information furnished by the verifier's advisers or attorneys. In each case, the court held that the verification upon personal knowledge was not required, and that verification upon hearsay information was sufficient. All of these holdings are concededly sound. None have any relation to the issues in this case.

Petitioner's deposition reveals that she had never acquired or assimilated the most elementary information or understanding concerning the parties to this litigation or

the securities transactions or charges contained in the complaint, yet she swore that she was familiar with them, and that she believed them to be true because she had been informed about them. Without such information and understanding she could not truthfully make these allegations upon information and belief.

Petitioner asserts on page 35 that a verification on information and belief was not intended to import "personal knowledge and understanding." The assertion, as we have seen, is obviously true with respect to personal knowledge. But contrary to the statement in petitioner's brief, not one of the authorities there cited stands for the proposition that verification may be made "on information and belief" without any "understanding". In fact, elimination of the requirement of some understanding would render such a verification a mere form of words.

Dismissal of petitioner's complaint was required in this case, but *not* solely because she lacked knowledge of the wrongs alleged. Dismissal was required because she had filed a false affidavit, claiming to have knowledge or belief when she had neither, claiming to have familiarity when she had none.

What a mockery it is for petitioner to argue (Pet. Br. p. 20) that:

> "The Securities Acts and derivative suits as instruments for preventing corporate misconduct are especially important in light of the increasing number of uninformed, small stockholders, particularly women. The role such stockholders can play in checking abuses is of major significance . . ."

"Uninformed, small", female "stockholders" indeed. This was the action of a graduate lawyer, an M.A. in economics, an investment counselor of ten years experience, a holder of more than 2,000 shares of Hilton stock. The fraud was his, the dismissal for that fraud alone is justified.

II.

RULE 23(b) REQUIRES THAT THE ENTIRE COMPLAINT BE VERIFIED. PETITIONER'S FALSE AFFIDAVIT IS A FRAUD AND A NULLITY. AS SUCH IT DOES NOT SATISFY THE RULE.

A. Petitioner Concedes That Rule 23(b) Applies to This Case and That A Verification Was Required.

It is not necessary to go beyond the affidavit appended to the complaint. It clearly shows that the petitioner and her counsel construed Rule 23(b) at the time the complaint was filed in accordance with its plain language to require a verification of each allegation of the eleven counts of the complaint.

Before this Court petitioner has conceded that her action is entirely "a derivative suit" (Pet. Br. p. 2). Thus the exhaustive analysis of the Court of Appeals of each of the counts of the complaint, and the conclusion based upon that analysis that, in the circumstances alleged in the complaint, the appropriate federal statute created a cause of action only in the corporation itself, is fully justified.

In this regard the instant case is quite different from that considered by this Honorable Court in *J. I. Case Company* v. *Borak*, 377 U.S. 426 (1964). In *Borak*, the shareholder plaintiff complained of misleading statements

in the proxy materials with resulting injury to the plaintiff's pre-emptive right as a shareholder. The cause of action sued on could be considered either derivative or direct. In contrast, each of the claims set forth in the complaint in the instant case is solely and squarely derivative. No personal loss is claimed by petitioner. The loss, if any, is alleged to have been suffered by Hilton Hotels Corporation.*

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* Petitioner did not participate in the transactions complained of either as a seller or as a purchaser.

Under these circumstances the Federal Securites Act of 1933 and the Securities Exchange Act of 1934 permit suits only by sellers or purchasers. Counts IV and X of the Complaint are based on § 12 of the Securities Act of 1933, 15 U.S.C. § 77(1) which provides that certain sellers of securities who violate the Act "shall be liable to the person purchasing such security from him." Only the purchaser has a cause of action, *Slavin* v. *Germantown Fire Insurance Co.*, 174 F.2d 799 (3rd Cir. 1949), cf. *MacClain* v. *Bules*, 275 F.2d 431 (8th Cir. 1960).

Counts III and IX of the Complaint are based on § 9 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(i) which provides that certain violators "shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction."

Counts I and VII are based on § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j) which does not expressly provide for actions for damages for violations of the Section. The federal courts have held that such civil liability exists. However, where, as in this case, the corporation was the party allegedly injured by the violation, the courts have held that the only cause of action is that of the corporation. *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952) cert. denied 343 U.S. 956 (1952); *Slavin* v. *Germantown Fire Insurance Co.*, 174 F.2d 799, 805-806 (3rd Cir. 1949); *Kremer* v. *Selheimer*, 215 F. Supp. 549, 552 (E.D. Pa. 1963).

Counts II and VIII are based upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77(q). This Section, like Section 10(b), does not specifically provide for civil liability. However, the language of

The only reference to "the federal question" argument is found in footnote 11 at pp. 27 and 28 of petitioner's brief. The footnote states that the petitioner "need not go so far as to urge the point here." Petitioner's brief therefore concedes, as indeed it must, that since this is solely a derivative action, Rule 23(b) applies and requires a verification.

B. The Unambiguous Language of Rule 23(b) Clearly Requires Verification of the Entire Complaint.

Rule 23(b) is entirely clear and unambiguous. It requires verification of the entire complaint, not merely a few preliminary allegations. The Rule provides in pertinent part:

> "In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, *the complaint shall be verified by oath . . .*"

In fact, petitioner merely concedes the obvious when she states:

> "The grammar of the Rule—both as originally written and as it now is embodied in Rule 23(b)—indicates that the entire complaint in a derivative suit is to be verified." Pet. Br. 30.

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the Section and particularly the condemnation of devices which operate as a "fraud or deceit upon the purchaser" indicates that it, like the other sections, would give a cause of action only to the purchaser—the corporation. This conclusion is supported by the existing authorities, *Newman* v. *Baldwin*, 179 N.Y.S. 2d 19, 23 (Spec. term 1958); See *Birnbaum* v. *Newport Steel Corp.* 193 F.2d 461, 463 (2nd Cir. 1952).

When the language of a statute or rule is clear and unambiguous and permits only one reasonable construction, that statute or rule must be enforced according to its terms.

Rules promulgated by this Court may be changed only through the rule-making process. It is in that process that policy arguments such as those relied upon by petitioner may be considered and weighed.

As this Court stated in rejecting a proposed emasculation (on alleged grounds of public policy) of Rule 45(b) of the Federal Rules of Criminal Procedure:

> "Rule 45(b) says in plain words that '. . . the Court may not enlarge . . . the period for taking an appeal.' . . . the plain words, the judicial interpretations, and the history, of Rule 45(b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand.
>
> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. . . ." *United States* v. *Robinson*, 361 U.S. 220, 229 (1960).

See also *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 322-324 (1959); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 (1964); *Miner* v. *Atlass*, 363 U.S. 641 (1960). As to statutes, see also *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956); *United States* v. *Rice*, 327 U.S. 742, 752-753 (1946); *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948).

Rule 23(b) was first adopted as Equity Rule 94 in 1882. From its adoption until the revision of the equity rules promulgated by this Court on November 4, 1912, the Rule provided in pertinent part:

> "*Every bill* brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, *must be verified by oath*, and must contain . . . (the specific allegations now referred to in Rule 23(b))." 104 U.S. ix, x, January 23, 1882.

In 1912, old Equity Rule 94 became Equity Rule 27. The language of Rule 94 was preserved intact in the new Rule, which remained unaltered until the adoption of the Federal Rules of Civil Procedure.

At the time of the adoption of the Federal Rules, the draftsmen followed a deliberate policy of making the verification an "exception and not the rule." 2 Moore's Federal Practice, Par. 11.03, p. 2105 (2d Ed. 1963). In most categories of civil cases, the attorney's signature to the complaint sufficed and no verification was required. The requirement of verification was retained in only a few situations. One of these was the shareholder's derivative action.

In 1948 the Federal Rules of Civil Procedure were revised. At that time the requirement of verification was eliminated in several types of actions*, but was retained

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* *e.g.* Interpleader 28 U.S.C. 1335 (formerly 28 U.S.C. 41(26)), Plea of Non Est Factum, 28 U.S.C. 1733 (formerly 28 U.S.C. 665), Petitions filed against the United States 28 U.S.C. 1402 (formerly 28 U.S.C. 762). See generally *2 Moore's Federal Practice,* Par. 11.03 (2d Ed. 1963).

in Rule 23(b). This could hardly have been inadvertent since the revisors carefully considered whether the requirements of Rule 23(b) were substantive or procedural. Again, in 1963, the Rules were revised, but again the verification requirement of Rule 23(b) was retained, with its original language unchanged.

Whenever This Court Has Had Occasion To Refer To The Verification Requirement, It Has Described The Requirement As The Verification Of The Entire Complaint.

Equity Rule 94 was adopted as a result of the decision of this Court in *Hawes* v. *Oakland*, 104 U.S. 450 (1882) in which, at p. 461, this Court stated in substance the requirements which were later embodied in the Rule. The Court stated that certain specified allegations "should be in the bill [Complaint in Equity], which should be verified by affidavit." The language refers to verification of "the bill", not merely allegations relating to standing to sue.

In *Cohen* v. *Beneficial Loan Corp.* 337 U.S. 541, 556 (1949), this Court described Rule 23 as requiring "the stockholder's complaint to be verified by oath."

Despite the "concession" that Rule 23(b) by its plain language requires the plaintiff to verify the entire complaint, petitioner's brief relies completely on the argument that, at most, Rule 23(b) requires verification of only three of the allegations in the entire complaint: (1) the allegation asserting plaintiff's ownership of stock at the time of the alleged wrongdoing; (2) the allegation denying that the action is collusive, and (3) the allegation setting forth the plaintiff's attempts to have the corporation enforce its own cause of action. This construction is not supported by any authority and is contrary to the language, history and purpose of Rule 23(b).

C. Neither the Language Nor the Purpose of Rule 23(b) Is Limited to Requiring the Verification of Allegations Relating to Standing to Sue Only. It is a Rule Intended To Assure That Shareholder Derivative Suits Are Well-Founded and Brought for Good Cause.

An examination of the language and content of Rule 23(b) demonstrates that its purpose is not limited to the prevention of collusive suits.

Rule 23(b) contains four pleading requirements. The first is the verification requirement which is at issue in this case. Second, the Rule requires an allegation that the action is not a collusive suit. Obviously, this allegation is intended to prevent abuse of diversity jurisdiction. Third, the Rule requires specific allegations describing the efforts of the plaintiff to secure prosecution of the corporate cause of action by the corporation and the reasons for failure to secure corporate action. This requirement has no apparent connection with the prevention of collusive suits. It is intended to satisfy the requirement that the corporation be given every opportunity to prosecute its own cause of action before the shareholder is permitted to utilize the extraordinary remedy of a derivative action.

The fourth requirement of Rule 23(b) is an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains or that his shares thereafter devolved on him by operation of law. Plaintiff's counsel argue that this "contemporaneous ownership" requirement was intended to prevent the apparent creation of diversity of citizenship jurisdiction in collusive actions by the purchase of shares by a person of the requisite citizenship just before the filing of the action. It is clear that an equally important purpose of this provision was to preclude the "purchase of a lawsuit" after the alleged wrong by a person who desired to speculate in litigation.

1. Rule 23(b) Is Intended To Prevent "Unfriendly", as Well as Collusive, Derivative Actions When the Requirements of the Rule Are Not Fulfilled.

Multiple purposes for Rule 23(b) were first indicated in the decision of this Court in *Hawes* v. *Oakland*, 104 U.S. 450 (1882) *supra*. There, the Court affirmed the dismissal of the shareholder's derivative action which complained that the corporation improperly allowed a municipality free use of the corporation's water. In that case, this Court enunciated the requirements which have since been codified in Rule 23(b) and its predecessor equity rules. As petitioner points out (Pet. Br. p. 25) this Court did discuss the necessity of preventing collusive actions between "friendly" shareholders and corporate management. The opinion, however, went on to catalogue types of grievances which could be made the subject of derivative actions by "unfriendly" shareholders, and to confirm the necessity of bona fide efforts by a would-be shareholder plaintiff to obtain corporate enforcement of the cause of action prior to the institution by such shareholder-plaintiff of a derivative suit. The Court stated at pp. 460-462:

> "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit— [This Court here listed a large number of specific wrongs, which if committed by directors, would justify the institution and prosecution of a derivative action by the shareholder.]

> But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes.
>
> * * *
>
> The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.
>
> If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?
>
> This question answers itself, and without considering the other point raised by the demurrer, we are of the opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity—no right in himself to prosecute this suit."

This language makes clear that the Court intended the requirements of Equity Rule 94 to apply to and to regulate "unfriendly" as well as "friendly" derivative actions and that the provisions of the Rule have purposes distinct from and in addition to the prevention of collusive suits.

The fact that old Equity Rule 94 was not intended solely to prevent collusive actions is further conclusively demonstrated by the opinion of this Court in *Dimpfell* v. *Ohio and Mississippi R. Co.*, 110 U.S. 209 (1884), a decision rendered

by the same Court (with one exception) which had adopted Rule 94. This case was a real contest between the shareholder and the corporate management. Consequently, there would have been no reason to affirm the dismissal of the action if prevention of collusive suits were the only purpose to be served by the Rule. Nevertheless, the dismissal was affirmed, squarely on the basis of lack of compliance with Equity Rule 94. The Court's decision was based upon the fact that the complaint did not satisfy two requirements of that Rule *i.e.* it did not allege that the plaintiff was a shareholder at the time of the alleged wrongdoing and it did not properly show attempts to secure action by the corporation itself. The Court stated at p. 210:

> "And it does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterward expressly to annoy and vex the company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive."

Obviously, concern with abuses of "unfriendly" shareholders actions was one of the considerations which impelled the court which promulgated Rule 94.

A much more recent decision bearing on this question is *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). There application of the security-for-costs statute of the forum state was upheld in a stockholder's derivative action. In the portion of the opinion which considered the constitutionality of state security-for-costs legislation, the Court

discussed the nature of stockholder derivative actions and the purpose and effect of Rule 23, first pointing to the historical need for stockholder derivative actions and the abuses which were sometimes attendant upon their prosecution. The Court said, in justifying state regulation of such cases (337 U.S. at 549):

> "The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers."

The Court went on to describe a plaintiff such as petitioner here as follows (337 U.S. at 549-550):

> "Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing *standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. . . .*"

The Court commented in this connection upon Rule 23(b) stating (337 U.S. at 550, 556):

> "It is not without significance that this Court has found it necessary long ago in the Equity Rules* and now in the Federal Rules of Civil Procedure** to impose *procedural regulations of the class action not applicable to any other.*
>
> * * *
>
> "*Rule 23 requires the stockholder's complaint to be verified by oath and* to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. In other words, the federal court will not permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations. It also requires a showing that an action is not a collusive one to confer jurisdiction and to set forth the facts showing that the plaintiff has endeavored to obtain his remedy through the corporation itself."

In *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R. Co.*, 213 U.S. 435 (1909) relied upon by petitioner, (Pet. Br. 26) the Court actually made it clear that the purpose of Rule 94 relates not only to jurisdiction but *also to the preservation of the control of a corporation over its own affairs and to the restriction of shareholder suits to cases of real necessity.* The Court stated at pp. 446-447:

> "The purpose of Rule 94 hardly needs explanation. It is intended to secure the Federal courts from imposition upon their jurisdiction *and recognizes the right of*

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* Old Equity Rule 94, 104 U.S. ix; Equity Rule 27, 226 U.S. 649, 656.

** Rule 23(b).

the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interests of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right."

The existence of a number of purposes for Rule 23(b) and its predecessors is also demonstrated by the discussion in 3 Moore's Federal Practice, § 23.15 through 23.19 (2d Ed. 1963).

Lower Federal Courts, in applying Rule 23(b) to derivative actions, have emphasized that it does not establish jurisdictional requirements solely, but performs a salutary function in protecting corporations against the dissipation of assets. *Gottesman* v. *General Motors Corporation,* 28 F.R.D. 325 (S.D. N.Y. 1961); *Pioche Mines Consolidated, Inc.* v. *Dolman,* 333 F. 2d 257, 265 (9th Cir. 1964) cert. denied 380 U.S. 956 (1965); *Bauer* v. *Servel, Inc.,* 168 F. Supp. 478, 481 (S.D. N.Y. 1958); See also opinion by Roscoe Pound, Comm., in *Home Fire Insurance Co.* v. *Barber,* 67 Neb. 644, 93 N.W. 1024, 1029 (1903).

2. There Are Compelling Reasons For The Requirement Of Rule 23(b) That The Entire Complaint, Accusatory As Well As Jurisdictional Allegations, Be Verified.

In a case such as that presently before the Court, an understanding plaintiff could have verified the period of his stock ownership, the lack of collusion, and the unavailing demand for action by the directors. Why require more?

Because the failure of the directors to act may have been the result, as would be proved here, of a total lack of justification for the charges of corporate wrongdoing on which the directors were asked, and refused, to act. It is a proper requirement of the law, embodied in Rule 23(b), that the plaintiff who complains of a lack of corporate response by its elected directorate to such charges of wrongdoing make those charges only upon oath.

There are compelling reasons for this requirement. These reasons apply whether the plaintiff swears to the truth of the allegations as of his own knowledge, or that they are believed to be true based upon information on which the plaintiff relied.

The derivative action is unique in that it removes control of corporate activity from the elected corporate officers and directors, and places it in the hands of a volunteer. In the proper case this is the most salutary of results, for in this manner corporate malefactors can be called to account for their wrongs to the corporation.

It is equally true, however, that the serious charges which justify the transfer of control must be made only for a proper purpose. The critical allegations are not jurisdictional allegations, the four "allegations upon which * * * standing to sue rests" (Pet. Br. pp. 31-34). Allegations of wrongdoing must be made if the complaint is to withstand summary dismissal. These allegations *are* serious, for from them arises the necessity that the corporation and its directors defend a long and expensive lawsuit, or engage in equally long and expensive discovery procedures.

If the affiant has no knowledge, but must allege a belief obtained from information furnished by another, that "other" may be called to account for the charges made. Only by requiring that these allegations be verified by the person making them can adequate assurances be obtained that the person who has made a record of his claims is willing to make oath as to the accuracy of those claims. If that oath is false, as here, the purposes of Rule 23(b) are not accomplished.

It is not unreasonable, therefore, to suggest that, because of their nature, stockholder's derivative actions *should* require knowledge on the part of the plaintiff of the general nature of the action, even though the verification may be by the plaintiff's fiduciary who has access to more specific facts, or who can indicate to the defendants the source of the agent's information and belief that a wrong was done to the corporation. The derivative suit is a long, expensive procedure. True it is that the facts are particularly in the possession of the corporation and its allegedly faithless management. But all shareholders have an interest in the preservation of corporate assets, either through the preventing of waste in defending frivolous lawsuits, or in the collection of assets wrongfully diverted by the management.

That there is a serious reason for balancing the interests of the shareholder-plaintiff against the interests of the other shareholders and the corporation is stated in Douglas; DIRECTORS WHO DO NOT DIRECT, 47 Harvard Law Review; 1305, 1327 (1934):

> "In the first place, there is the small and isolated investor who needs adequate opportunity for protection against the managers or the board. In the second place, there are the managers and the board who need effective protection against the blackmailer or striker, lest the risks attendant to those business positions prove to be too onerous. Making it easier for the legitimate plaintiff and harder for the illegitimate is a

problem which will never be wholly solved, but some progress can be made. In one form or other it means granting to trial courts greater discretion."

One District Court responded to this concept by imposing costs upon the plaintiff after the dismissal of a stockholder's suit in which:

"The plaintiff testified that he had never read the complaint, did not know what it contained, and was unaware of the charges made over his name in the complaint against the defendant corporation; that he had not contributed to the expenses of the litigation; that he did not know any of the information that was contained in the complaint, nor did he give such information to the plaintiff's attorney, nor did he know in what manner his counsel obtained the information for the purposes of preparing the complaint.

"Apparently the plaintiff gave the use of his name to others for the purpose of instituting this action. This action was brought without any basis, and was vexatious and oppressive. It was brought solely for the purpose of annoying and harassing the defendant corporation and its business."

Gazan v. *Vadsco Sales Corporation*, 6 F. Supp. 568 (E.D.N.Y. 1934).

This Court has always recognized the value of shareholder's derivative actions redressing breaches of duty by management. It is equally clear that this Court has recognized that "unfriendly" derivative actions, as well as "friendly" derivative actions, have potentialities for abuse greater than those present in ordinary civil litigation. Reasonable regulation of the "unfriendly" derivative action is

justified in order to prevent such abuse, and to preserve in proper cases the benefits of the derivative action.*

D. Petitioner's Authorities and Reasons Do Not Support Her "Interpretation" of Rule 23(b).

Petitioner has not cited a single case or even a single commentator interpreting Rule 23 or its predecessor rules to require verification *only* of certain allegations of the complaint.**

1. Petitioner's Own Authorities Point Up the Difference Between true "Interpretation" and the Emasculation of Rule 23(b) Sought by Petitioner.

The authorities cited by petitioner in support of the proposition that Rule 23(b) should be construed "liberally" actually illustrate the difference between genuine construction and the emasculation of the Rule sought by petitioner.

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* It is significant that 36 states, including states in which the vast bulk of shareholder derivative actions are litigated, have imposed, by statute or rule of court, regulations upon the maintenance of such actions not imposed with respect to other civil litigation. The chart which is attached as an appendix to this brief depicts the regulations in effect in each state. Thirteen states require that complaints in derivative actions be verified under oath.

** Petitioner cites no case which holds that the prevention of collusive actions is the *sole purpose* of Rule 23(b). As we have noted, some of the cases relied upon by petitioner for her "interpretation," actually support the contrary conclusion that the Rule serves a number of additional purposes. Some of petitioner's authorities, such as *Huntington* v. *Palmer*, 104 U.S. 482 (1882); *Doctor* v. *Harrington*, 196 U.S. 579 (1905); and *Groel* v. *United Electric Co.*, 132 Fed. 252 (C.C.D.N.J. 1904), involved factual situations concerned *solely* with collusive actions or the existence of diversity jurisdiction. Consequently the opinions in these cases discuss primarily the "collusive suits" portion of the Rule. But none of these authorities assert that the Rule serves this purpose and no other.

For example, Rule 23(b) is silent as to whether verification shall be on personal knowledge or upon information and belief. In *Palmer* v. *Morris,* 316 F. 2d 649 (5th Cir. 1963) and *Murchison* v. *Kirby,* 27 F.R.D. 14 (S.D. N.Y. 1961) the courts held that Rule 23(b) was satisfied by a proper verification on information and belief. Most courts permit either type of verification, and consequently the holdings of both these cases were reasonable constructions of the Rule.

In *Hoover* v. *Allen,* 180 F. Supp. 263 (S.D. N.Y. 1960) the Court held that, in a multi-plaintiff derivative action, a verification by *one* plaintiff was sufficient. Since Rule 23(b) merely requires that "the complaint shall be verified by oath", the conclusion that multiple verifications were not required was clearly a permissible *construction.*

Similarly, the Rule is silent as to the person or persons who may verify. In *Bosc* v. *39 Broadway, Inc.,* 80 F. Supp. 825 (S.D. N.Y. 1948) the Court *construed* Rule 23(b) to permit verification by the plaintiff's attorney.

None of these cases changed the meaning of the Rule, nor reduced its effectiveness in carrying out the purposes for which it was adopted. In contrast to these cases of *construction,* petitioner here seeks no construction of the Rule but emasculation of the words "the complaint shall be verified by oath" so that they mean not what they say, but that only some of the allegations of the complaint need be verified at all, and that, as to these few, a false verification will suffice.

2. The "Fading Away" of the Alleged "Conflict" of the Decision of the Court of Appeals with Decisions of this Court and Decisions in the Second Circuit.

In the petition for certiorari, petitioner laid great stress upon an alleged conflict between the decision of the Court of Appeals in this case on the one hand, and the decision

of this Court in *Koster* v. *Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947) and the decision of a district court in *Murchison* v. *Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961) on the other. This alleged important "conflict" has virtually disappeared from petitioner's brief on the merits. In fact, of course, no conflict ever existed and the citation of these cases by petitioner merely reflects the desperation of her position.

Koster v. *Lumbermen's Casualty Co.* upheld the dismissal of the shareholder's derivative action on the ground of *forum non conveniens*. The portion of the opinion quoted at pages 29-30 of petitioner's brief concerned the unimportance of the shareholder-plaintiff's role *in the trial of the action*, particularly as a witness. The language quoted refers to the fact, which we have already emphasized, that the shareholder-plaintiff may have no *first hand knowledge* of the facts of the law suit, therefore may not be a competent witness, and may "make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation." 330 U.S. 518, 525. This consideration was important in dealing with the question of whether a motion to dismiss a derivative action on the ground of *forum non conveniens* could be defeated merely by showing that the action was pending in the district in which the shareholder plaintiff resided. It has no relevance to the issue in this case, dismissed by reason of a false verification, for the *Koster* case has nothing to do with verification. It does not imply, much less hold, that the verification requirement may be dispensed with. To the contrary, this Court specifically stated that a shareholder may sue on behalf of other shareholders "only if the conditions laid down by Rule 23 . . . are complied with . . . " 330 U.S. at 523-524. The requirement that the verification be true,

and be by an affiant with understanding of the gravity of the charges made against corporate directors, is not eliminated.

Petitioner's reliance upon the district court's decision in *Murchison* v. *Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961) merely illustrates petitioner's determination to try this appeal on the false issue of the propriety of a verification on information and belief as distinguished from one made upon personal knowledge. *Murchison* v. *Kirby* involved an attack upon a shareholder plaintiff for lack of *first-hand knowledge* of the allegations of the complaint. Plaintiff Murchison testified, as quoted in the petition (27 F.R.D. at 19 n. 10):

> "My information is not direct. I have asked my lawyers to see if it is possible to make a case out of this thing. . . . I wasn't there . . . so my information is general."

The opinion is that case upheld the propriety of Murchison's reliance upon information furnished to him by his lawyers and other advisers, and rejected a contention that the suit should be dismissed as sham *under Rule 11*.

Again, this decision has no significance in this case. The Court of Appeals in its decision in the case at bar repeatedly emphasized that plaintiff-verifiers may rely upon information given to them by attorneys and other advisers. The report of that case shows affirmatively that Mr. Murchison had received extensive information and reports from his attorneys. He was able to communicate such information in the course of his *1800 page* deposition! A reading of the *Murchison* opinion compels the conclusion that Mr. Murchison readily satisfied the test stated by the Court of Appeals in this case. There is nothing in the

opinion which suggests that his state of mind was anything like that of Mrs. Surowitz, or *that he had sworn to a false affidavit.*

E. No Issue Relating to The Securities Act Is Presented Upon this Appeal.

The petitioner's brief attempts to suggest to this Court that the effective enforcement of the Securities Act of 1933 and the Securities Exchange Act of 1934 depend upon the outcome of this appeal. This is a sham issue. No question is presented with respect to the interpretation of the Securities Acts or the enlargement or diminution of causes of action created by those statutes.

The only question at issue is the integrity and enforcement of the Federal Rules, and the protection of the federal courts, the defendants and the other shareholders involved from the fraud and imposition created by the filing of false affidavits.

There is nothing in the record in this case or in the history of derivative actions to suggest that the holding of the Court of Appeals would impair in the slightest the enforcement of the Securities Acts or the procedures for securing redress against improper actions by corporate management. The Court of Appeals stated repeatedly that shareholder-verifiers may rely substantially upon information received from attorneys or other advisers and that a plaintiff need not recall technical factual information in order to satisfy Rule 23(b). The only requirements are those inherent in any swearing to facts on which a lawsuit is based:

> "But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties

against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint." (R. 236).

It is patently absurd to suggest that such a test will disqualify any potential shareholder-plaintiffs. Any plaintiff who is not a mere puppet will have no problem in satisfying it. To suggest otherwise is to indulge the incredible presumption that bona fide shareholder derivative actions are commenced in which neither the plaintiff nor his fiduciaries have any understanding of the transactions involved, or the charges made, or the reasons why the charges are believed to be soundly based, and *have no belief in the truth of the serious charges being made.*

Furthermore, the dismissal of this action does not destroy or in any way impair any cause of action under the Securities Acts. Any causes of action Hilton Hotels Corporation may have had, based upon the transactions referred to in the petitioner's complaint, were unaffected by the dismissal of this action and may be asserted by the corporation or by another shareholder. See *Costello* v. *United States*, 365 U.S. 265 (1961).

Petitioner's counsel have been unable to cite a single case in the long history of shareholder derivative litigation which would have been dismissed under the Rule as interpreted by the Court of Appeals. At this point, the record shows a plaintiff without knowledge of the lawsuit who has filed a false affidavit. Does this mean that an unsophisticated plaintiff cannot bring such an action? It does not; it means simply that, until Rule 23(b) has been complied with, whether by the plaintiff or some other knowledgeable affiant, there is no proper basis for the derivative action.

Petitioner's Security Act public policy argument is merely a smoke screen designated to obscure the real issues of the appeal.

III.

PETITIONER DELIBERATELY CONFRONTED THE TRIAL COURT WITH A CHOICE BETWEEN NULLIFICATION OF RULE 23(b) AND DISMISSAL—DISMISSAL WAS PARTICULARLY APPROPRIATE IN THESE CIRCUMSTANCES.

The Court of Appeals held that the District Judge properly dismissed the complaint on the basis of Rule 41(b) FRCP. That rule expressly provides:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Again finding the express provisions of the Federal Rule against her, petitioner argues against a "strict and technical" interpretation and asserts that the dismissal is not consistent with the "spirit and purpose of the Federal Rules." This approach is, of course, reminiscent of petitioner's argument concerning Rule 23(b), for acceptance of petitioner's argument in the circumstances of this case would be a nullification of Rule 41 as it would be of Rule 23(b).

Petitioner's suggestion for the enforcement of the Federal Rules is contained in Page 53 of her brief:

> "Instead of dismissing, the district court, once satisfied . . . (that the signature of counsel was proper under Rule 11) should have required defendants to answer."

In other words, once the trial court found that the petitioner had violated Rule 23(b) and persisted in that violation, the court should have ignored or condoned the

violation and permitted the action to proceed without compliance with the Rule. This is no "liberal" interpretation. It is a proposal for nullification of the Federal Rules of Civil Procedure promulgated by this Court. Such a proposal deserves no judicial consideration.

The Remedy of Dismissal, Which Barred Further Action on This Claim By This Shareholder But Not the Corporate Cause of Action, Was Peculiarly Appropriate Under the Circumstances.

The Surowitz deposition and the Brilliant affidavit demonstrated that the instigator of this action, a substantial and extremely sophisticated stockholder, had induced his mother-in-law to file the action and execute a blatantly untruthful affidavit of verification when she had not the slightest comprehension of the gravity of the charges she was making. When this deceit was called to the trial court's attention, petitioner's counsel spurned the trial court's suggestions that the defect be corrected by adding additional parties plaintiff, or by substitute verification. Counsel insisted in the trial court, as they do in this Court, that they had a right to proceed without complying with Rule 23(b). Since the trial court could not force them to file a proper verification, the only alternative to a nullification of the Rules was dismissal.

Petitioner attacks the dismissal as too harsh to fit the "crime." In fact, however, the trial court's action accomplished a just result. It barred the action by this particular shareholder as a necessary consequence of her refusal to comply with the Rules. On the other hand, the dismissal had no effect upon the underlying corporate

cause of action.* *Costello* v. *United States*, 365 U.S. 265 (1961).

In fact, the results in this case were much less "harsh" than the effect of this Court's decision in *Link* v. *Wabash Ry. Co.*, 370 U.S. 626 (1962). There, certain pretrial delays, culminating in the failure of plaintiff's counsel to attend a pretrial conference, resulted in a dismissal with prejudice which permanently barred the plaintiff's cause of action for personal injuries. If that case involved "aggravated" circumstances justifying dismissal, as petitioner's brief suggests (Pet. Br. 51-52), there can be no doubt that the circumstances in this case not only justified but compelled dismissal.

In the *Link* case plaintiff suffered dismissal by reason of a default committed by his counsel. Here the complaint was dismissed by reason of petitioner's own false affidavit. In *Link* the plaintiff was given no warning or chance to correct his counsel's default. Dismissal was immediate. In this case petitioner and her counsel were given every opportunity to correct the defect. The trial judge made repeated, detailed suggestions as to the means of correction. Dismissal came only after counsel rejected these suggestions and insisted upon standing on the false affidavit. Finally, in *Link* the dismissal completely extinguished the plaintiff's personal cause of action for injuries. In this case the underlying cause of action, that of the corporation, is preserved intact and only the right of the offending shareholder to prosecute that corporate cause of action is extinguished.

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* The continuing vitality of the corporate cause of action is demonstrated by the fact that a shareholder's derivative action complaining of the identical stock transactions referred to in the complaint in the case at bar is at issue and approaching trial in the Chancery Court of Delaware, *119 Fifth Avenue Corp.* v. *Beckhold, et al.*, Civil Action No. 1863.

In fact, despite the contrary suggestion in petitioner's brief, there is nothing novel about dismissals for failure to comply with the Federal Rules.

The following cases are examples of many decisions which have sustained dismissals under the first sentence of Rule 41(b) for failure of prosecution, or for failure to comply with the Federal Rules or with orders of court. *Package Machinery Co.* v. *Hayssen Mfg. Co.*, 266 F.2d 56 (7th Cir. 1959) (failure of plaintiff to specify trade secrets he claimed were stolen by defendant); *Maddox* v. *Shroyer*, 302 F.2d 903 (D.C. Cir. 1962) *cert. denied*, 371 U.S. 825 (1962) (persistent failure to comply with Federal Rules concerning pleadings); *O'Brien* v. *Sinatra*, 315 F.2d 637 (9th Cir. 1963) (failure to comply with rules and court order concerning separate statement of different causes of action); *Blake* v. *DeVilbiss*, 118 F.2d 346 (6th Cir. 1941) (failure to comply with rules and court orders concerning pleading); *Martin* v. *Hunt*, 29 F.R.D. 14, 16 (D. Mass. 1961) (same).

In a large number of other decisions Federal courts have held (without specific reference to Rule 41(b)) that shareholders' derivative actions *must* be dismissed if the plaintiff shareholder does not comply with the requirements of Rule 23(b), including verification. In *Johnson* v. *Brandon Corporation*, 183 F. 2d 444 (4th Cir. 1950), the court affirmed the dismissal of a derivative action solely on the ground that the plaintiff had not complied with the verification and other requirements of Rule 23(b). In *Pikor* v. *Cinerama Products Corporation*, 25 F.R.D. 92, 96 (S.D.N.Y. 1960), and *Dalva* v. *Bailey*, 158 F. Supp. 204, 207 (S.D.N.Y. 1957), the original plaintiffs in the derivative action had been eliminated and the issue concerned the

propriety of intervention by other shareholders. In each case the courts held that intervention would not be permitted unless the new plaintiffs filed verified complaints which satisfied the requirements of Rule 23(b). See also *Marcus* v. *Textile Banking Co.*, 38 F.R.D. 185, 186 (S.D. N.Y. 1965) (Absence of verification a "fatal defect.")

Other cases in which all or part of derivative causes of action have been dismissed because of failure to comply with one or the other of the provisions of Rule 23(b) include *Weinhaus* v. *Gale*, 237 F.2d 197 (7th Cir. 1956); *Quirke* v. *St. Louis-San Francisco Ry. Co.*, 277 F. 2d 705 (8th Cir. 1960), *cert. denied*, 363 U.S. 845 (1960); *Haffer* v. *Voit*, 219 F.2d 704 (6th Cir. 1955); *Wachsman* v. *Tobacco Products Corporation of New Jersey*, 129 F.2d 815 (3rd Cir. 1942); *Lucking* v. *Delano*, 129 F.2d 283 (6th Cir. 1942); *Gottesman* v. *General Motors Corp.*, 28 F.R.D. 325 (S.D. N.Y. 1961); *Milvy* v. *Adams*, 16 F.R.D. 105 (S.D.N.Y. 1954); remanded on other grounds 217 F.2d 647 (2d Cir. 1954); *Kaufman* v. *Wolfson*, 136 F. Supp. 939 (S.D.N.Y. 1955); *Elkins* v. *Bricker*, 23 F.R. Service 23b.1 Case 2 (S.D.N.Y. 1956); *Hausman* v. *Bailey*, 22 F.R.D. 304 (S.D.N.Y. 1958); *Gunn* v. *Voss*, 154 F. Supp 345 (D. Wyo. 1957); *Lissauer* v. *Bertles*, 37 F. Supp. 881 (S.D.N.Y. 1940); *Robbins* v. *Sperry Corporation*, 1 F.R.D. 220 (S.D.N.Y. 1940); *Hudson* v. *Davies, Richberg, Tydings, Beebe & Landa*, 13 F.R.D. 130 (S.D.N.Y. 1952); *Levitan* v. *Stout*, 97 F. Supp. 105 (W.D. Ky. 1951); *Jewish Consumptives Relief Society* v. *Rothfeld*, 9 F.R.D. 64, 67 (S.D.N.Y. 1949); *Varanelli* v. *Wood*, 9 F.R.D. 61 (S.D.N.Y. 1949); *Bruce and Company* v. *Bothwell*, 8 F.R.D. 45 (S.D.N.Y. 1948); *Abrahams* v. *Parkins*, 36 F. Supp. 238 (W.D. Pa. 1940); *Isaac* v. *Milton Mfg. Company*, 33 F. Supp. 732, 738 (M.D. Pa. 1940); *Henis* v. *Compania Agricola de Guatemala*, 116 F. Supp.

223 (D. Del. 1953), *aff'd*, 210 F.2d 950 (3d Cir. 1954); *Bowman* v. *Alaska Air Lines, Inc.*, 14 F.R.D. 70 (D. Alas. 1952); *Pergament* v. *Frazer*, 93 F. Supp. 9, 12 (E.D. Mich. 1949); *Lynch* v. *Yonkers National Bank & Trust Company*, 3 F.R. Serv. 23b.1 Case 1 (S.D.N.Y. 1940); *Bauer* v. *Servel, Inc.*, 168 F. Supp. 478 (S.D.N.Y. 1958); *McPhail* v. *Gum Products*, 11 F.R.D. 299 (D. Mass. 1951); *Toomey* v. *Wickwire Spencer Steel Co.*, 3 F.R.D. 243 (S.D.N.Y. 1942); *McQuillen* v. *National Cash Register Company*, 112 F.2d 877 (4th Cir. 1940), *cert. denied*, 311 U.S. 6[illegible] 1940).

Enforcement of the Federal Rules is necessary for the orderly administration of justice. Dismissal for violation of the rules could be "harsh" or "technical" only if no sufficient opportunity were afforded for correction and amendment. In this case there existed not only opportunity but express invitation by the trial court to substitute a proper verification. Petitioner's failure to accept these invitations was a deliberate choice. Her insistence that she be relieved of the consequence of this choice by the nullification of the Federal Rules and by the condonation of the filing of a false affidavit is unworthy of consideration by this Court.

IV.

PETITIONER'S ATTEMPT TO FORECLOSE DEFENDANTS FROM FILING ADDITIONAL MOTIONS AUTHORIZED BY THE FEDERAL RULES SHOULD BE REJECTED.

In view of petitioner's insistence upon relying upon a patently false and therefore inadequate affidavit of verification, there is no basis for any remandment to the trial court. Nevertheless, if the case should be remanded on any ground, there is no bas[illegible] for petitioner's suggestion that "the cause be remanded with instructions to reinstate the

complaint and to require the defendants to answer." (Pet. Br. 54) When petitioner's deposition was taken, respondents' time for answer or filing of motions had not expired. The deposition revealed the utter false and sham character of petitioner's verification and therefore presented an issue independent of and preliminary to any other questions. In their motion to dismiss, respondents specifically reserved the right to file any other motions. (R. 117-118) The order of the District Court entered February 26, 1964, the day the motion to dismiss was presented, specifically extended the time for defendants to file "responsive pleadings" to April 2, 1964. (R. 120). Since the District Judge dismissed the complaint on March 30, 1964, this order preserved the respondents' rights in the event of a remandment to file within the time limits specified by the Rules such other motions as they may believe are proper under the Federal Rules. There is no basis for petitioners' demand that this Court issue a remanding order which would foreclose respondents' rights in this respect.

CONCLUSION.

There are, therefore, at least three grounds for the affirmance of the decision below. Each is alone sufficient to justify dismissal.

The first is the fraud perpetrated by the filing of a false affidavit: " * * * plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant." (R. 235). As this Court has said, in another false oath case:

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good

> order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

The second ground is the failure of petitioner to comply with the requirements of Rule 23(b) which required verification of the complaint—not merely of part of the complaint—for good reasons. The filing of a false oath is the filing of no oath, and there has been no compliance with Rule 23(b).

Finally, there is the fact that petitioner here was a puppet plaintiff, one who not only had to depend upon others for all of the facts on which her cause of action was allegedly based but, more, was wholly lacking in comprehension of what she was suing about or with what "crimes" she was charging others. True it is that every protection must be afforded the uneducated and the unsophisticated, true it is that the courts must be jealous to assure such investors are not denied their day in court for technical reasons.

No such protection, no such jealousy is justified in ignoring that basic requirement of all lawsuits, parties who comprehend the gravamen of their actions. If the party cannot so comprehend, then there must be an appropriate representative who can and does. If that fundamental is not provided, then the courts will be open to lawyer litigation, and a sad day will have dawned in the world of jurisprudence. This is even more true in the instant case, where petitioner was not only a puppet, but where the very costs of the lawsuit were being borne by others, by those very individuals who were associated with the skilled lawyer, economics major and investment counselor, Mr. Brilliant, who was pulling the strings.

There is no question of plaintiff being denied a cause of action by the order here appealed. The cause of action is not that of petitioner, but rather of the corporation, or of any other of its thousands of shareholders. Plaintiff is required only to comply with the Federal Rules, and to refrain from attempting the fraud of a false affidavit.

The record clearly demonstrates that the trial court's action in dismissing the complaint was caused by the flagrant and persistent failure by petitioner and her counsel to comply with the Federal Rules of Civil Procedure. The Court of Appeal's affirmance of the trial court's action was proper and indeed necessary to enforce the Federal Rules. The dismissal should be affirmed.

Respectfully submitted,

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